

1403-290.00
1402-330.00

#21
X. Cofb
11/18/03

TRANSMITTAL OF APPEAL BRIEF

Docket No. M1025/7004

Applicant: Giorgio Trani and Marion Stern
Serial No: 09/678,008
Filed: October 3, 2000
For: CONTAINER WITH INHERENTLY STABLE BASE MADE OF FLEXIBLE MATERIAL AND METHOD FOR MANUFACTURING IT
Examiner: Sameh H. Tawfik
Art Unit: 3721

CERTIFICATE OF MAILING UNDER 37 C.F.R. §1.8(a)

The undersigned hereby certifies that this document is being placed in the United States mail with first-class postage attached, addressed to Assistant Commissioner for Patents, Washington, DC 20231 on October 14, 2003.

Frances M. Cunningham
Frances M. Cunningham

Assistant Commissioner for Patents
Washington, D.C. 20231

Transmitted herewith, in triplicate, is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on even date herewith, October 14, 2003.

Status of Applicant

This application is on behalf of BP Europak SpA.

Applicant claims small entity status.

Extension of Time

11/19/2003 EDATE 0 The proceedings herein are for a patent application and the provisions of 37 C.F.R. §1.136 apply. An extension of time of months is requested.

01 FC:1403
02 FC:1402

290.00 UP
330.00 UP

12/31/2003 SDIRETAAI 00000002 09678008

01 FC:1403
02 FC:1402

330.00 UP

02 FC:2402

165.00 UP

Fee Due 11/19/2003 SDIRETAAI
11/19/2003 EDATE 00000002 09678008
02 FC:1402 Request for Hearing
TOTAL FEE

\$330.00
\$290.00
\$620.00

Payment

Enclosed is a check in the amount of the total fee.
 The Commissioner is authorized to charge the total fee to Deposit Account No. 02-3038.
 The Commissioner is hereby authorized to charge any other fees under 37 C.F.R. §1.16 and §1.17 that may be required, or credit any overpayment, to Deposit Account No. 02-3038. A duplicate of this transmittal letter is attached.

M. Lawrence Oliverio

M. Lawrence Oliverio, Reg. No. 30,915

KUDIRKA & JOBSE, LLP

Customer Number 021127

Tel: (617) 367-4600 Fax: (617) 367-4656

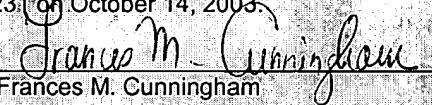
Date: 10/14/2003

FF21
X. Cobb
1-3

APPELLANT'S BRIEF UNDER 37 CFR §1.192		Docket No. M1025/7004
Applicant:	Giorgio Trani and Marion Stern	
Serial No:	09/678,008	
Filed:	October 3, 2000	
For:	CONTAINER WITH INHERENTLY STABLE BASE MADE OF FLEXIBLE MATERIAL AND METHOD FOR MANUFACTURING IT	
Examiner:	Sameh H. Tawfik	
Art Unit:	3721	

CERTIFICATE OF MAILING UNDER 37 C.F.R. §1.8(a)

The undersigned hereby certifies that this document is being placed in the United States mail with first-class postage attached, addressed to Assistant Commissioner for Patents, Board of Patent Appeals and Interferences, Washington, DC 20231 on October 14, 2003.


Frances M. Cunningham

Assistant Commissioner for Patents
Board of Patent Appeals and Interferences
Washington, D.C. 20231

This brief is in furtherance of the Notice of Appeal being filed concurrently herewith.

The fees required under § 1.17(c), and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief is transmitted in triplicate. (37 C.F.R. 1.192(a)) and contains these items under the following headings, and in the order set forth below (37 C.F.R. 1.192(c)):

- I REAL PARTY IN INTEREST
- II RELATED APPEALS AND INTERFERENCES
- III STATUS OF CLAIMS
- IV STATUS OF AMENDMENTS
- V SUMMARY OF INVENTION
- VI ISSUES
- VII GROUPING OF CLAIMS
- VIII ARGUMENTS
- IX APPENDIX OF CLAIMS INVOLVED IN THE APPEAL

RECEIVED
103 OCT 16 PM 3:33
BOARD OF PATENT APPEALS
AND INTERFERENCES

I REAL PARTIES IN INTEREST (37 C.F.R. 1.192(c)(1))

The real party in interest in this appeal is BP Europak SpA.

II RELATED APPEALS AND INTERFERENCES (37 C.F.R. 1.192(c)(2))

There are no other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal.

III STATUS OF CLAIMS (37 C.F.R. 1.192(c)(3))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1-13.

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims pending: 5-13
2. Claims canceled:
3. Claims withdrawn from consideration, but not canceled: 1-4
4. Claims allowed: none
5. Claims rejected: 5-13

C. CLAIMS ON APPEAL

The claims on appeal are: 5-13

IV STATUS OF AMENDMENTS (37 C.F.R. 1.192(c)(4))

All amendments submitted by applicant have been entered. The Request for Reconsideration of the patentability of claims 5-13 submitted by an amendment response of June 9, 2003 was considered by the examiner as indicated in the Final Office Action dated July 14, 2003.

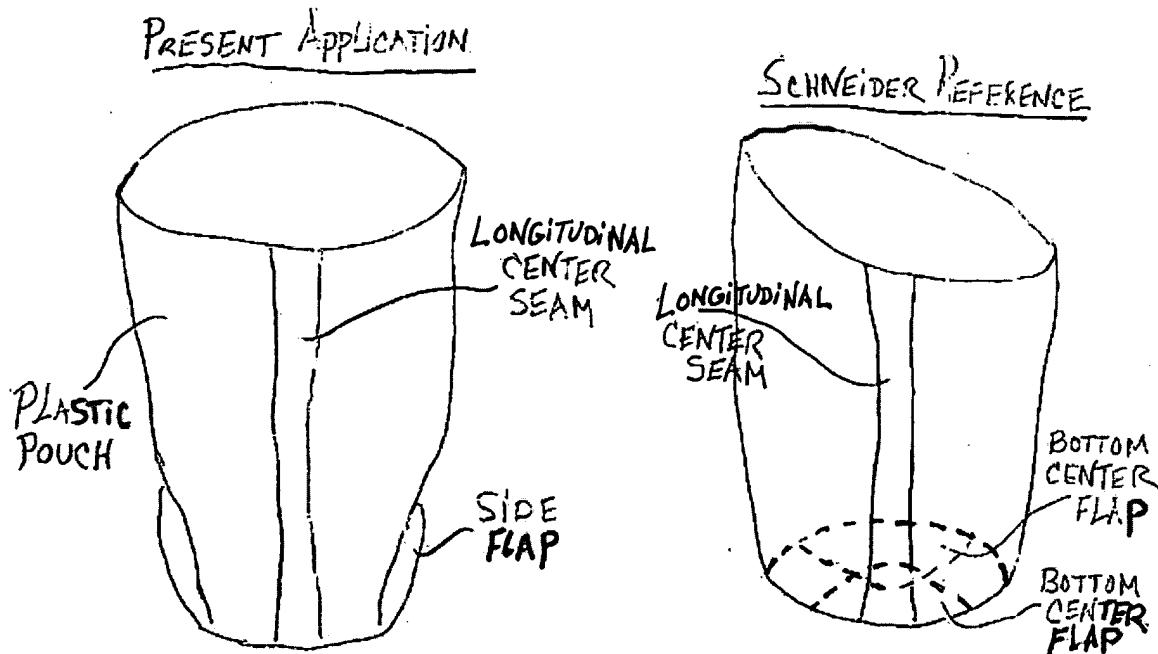
V SUMMARY OF INVENTION (37 C.F.R. 1.192(c)(5))

The present invention relates to the formation of a plastic pouch formed from a continuous sheet or film of plastic fed from a roll of plastic film. The package is formed during the process with longitudinal seal. After the longitudinal seal is formed, structurally stabilizing wings are formed and bonded to the sides of the package lateral to the longitudinal seal on the sides of the package relative to the longitudinal seal.

For purposes of explanation, a simplified illustration of the difference between claims 5-13 of this application versus the cited prior art (the Schneider reference) is shown immediately below. The immediately following figures are schematic for purposes of explanation only. A more detailed explanation is set forth below with reference to the actual figures of the present application and the figures of the cited Schneider reference.

In the present application, claims 5-13 call for a process that forms a container or pouch that has a center seam and "side" flaps that are formed and sealed "lateral" to the center seam.

In contradistinction, the cited Schneider reference discloses a container having "bottom" flaps that are formed in the "center" of a longitudinal seam.



VI ISSUES (37 C.F.R. 1.192(c)(6))

1. Whether claims 5-13 are unpatentable under 35 U.S.C. §102(b) as anticipated by U.K. Patent No. 1,115,636 to Schneider.

VII GROUPING OF CLAIMS (37 C.F.R. 1.192(c)(7))

Group 1: claims 5-12. These claims stand or fall as a group.
Group 2: claim 13. This claim stands or falls as a group.

VIII ARGUMENT (37 C.F.R. 1.192(c)(8))

Anticipation has not been established at least because the cited Schneider reference does not teach the claim elements of forming, folding and/or bonding of triangles and wings on the sides of a container laterally to a longitudinal seal or seam of the container.

In order for a Section 102(b) anticipation to exist, all material elements recited in a claim must be found in the one unit of prior art in issue. This is as true with regard to method/process claims as it is with product/apparatus claims. Application of Marshall, 198 U.S.P.Q. 344, 578 F.2d 301 (C.C.P.A. 1978).

Claims 5 and 13 of the present application, the independent claims, call for a multi-step process that forms a container, package or pouch that has a longitudinal seal or seam and transverse lateral seals or seams.

In claim 5, after the seals/seams are formed, step (b) of claim 5 calls for "forming two triangles having wings laterally disposed relative to the longitudinal heat seal." And, in step (d), claim 5 calls for "folding and bonding the wings laterally relative to the longitudinal heat seal."

Similarly, step (b) of claim 13 calls for "heat-sealing two triangles having wings into sides of the pouch lateral to the longitudinal heat-seal" and, in the same step (b), the wings are recited as "having a base which coincides with one edge of the pouch and a vertex which wedges inwards said pouch lateral to the longitudinal heat-seal."

As the Figures below show, the triangles 15 and wings 23 of the claims of this application are formed laterally on the sides of the container ninety degrees away from and not intersecting or otherwise interfering with the central longitudinal seal or seam 20 of the package. As can be readily imagined, if the wings and triangles were to intersect, overlap or interfere with the longitudinal seal 12, the container would assume a very different shape and less stability.

As claims 5 and 13 also state, the process of the invention calls for forming the triangles in the "sides" of the package. The plain meaning of "sides" of the package is lateral to and not intersecting the longitudinal seal 12.

The side/lateral relationship of longitudinal seal 12 to the triangles and wings 22, 23 is clearly shown in the Figures of the application, as for example shown below.

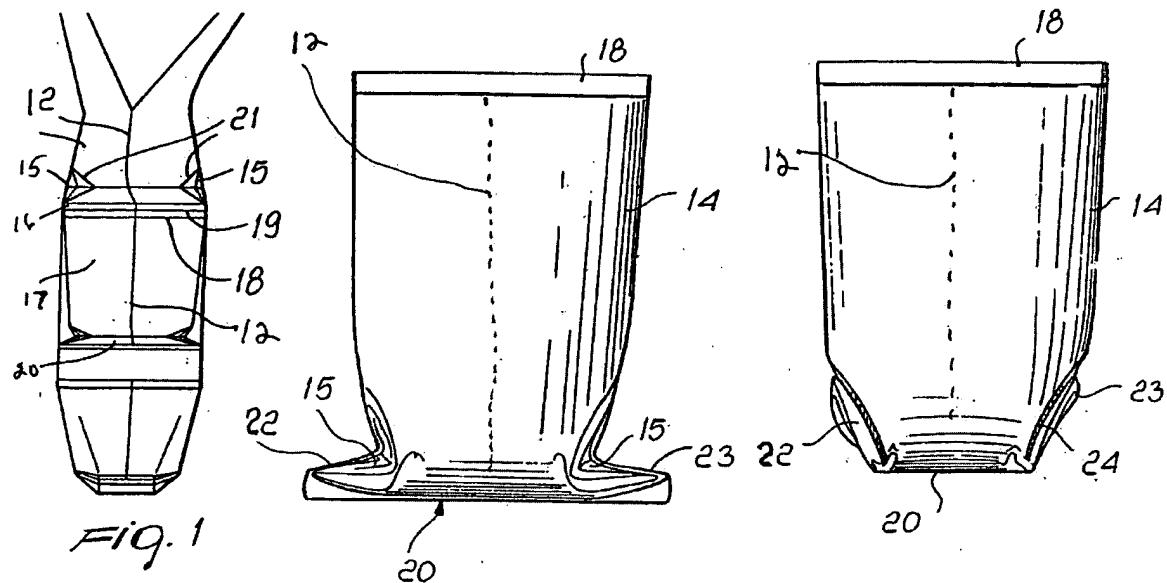


FIG. 1

As can be seen, the triangles 15 and the wings 22, 23 are lateral to the longitudinal seam 12, i.e. formed on the sides of the pouch.

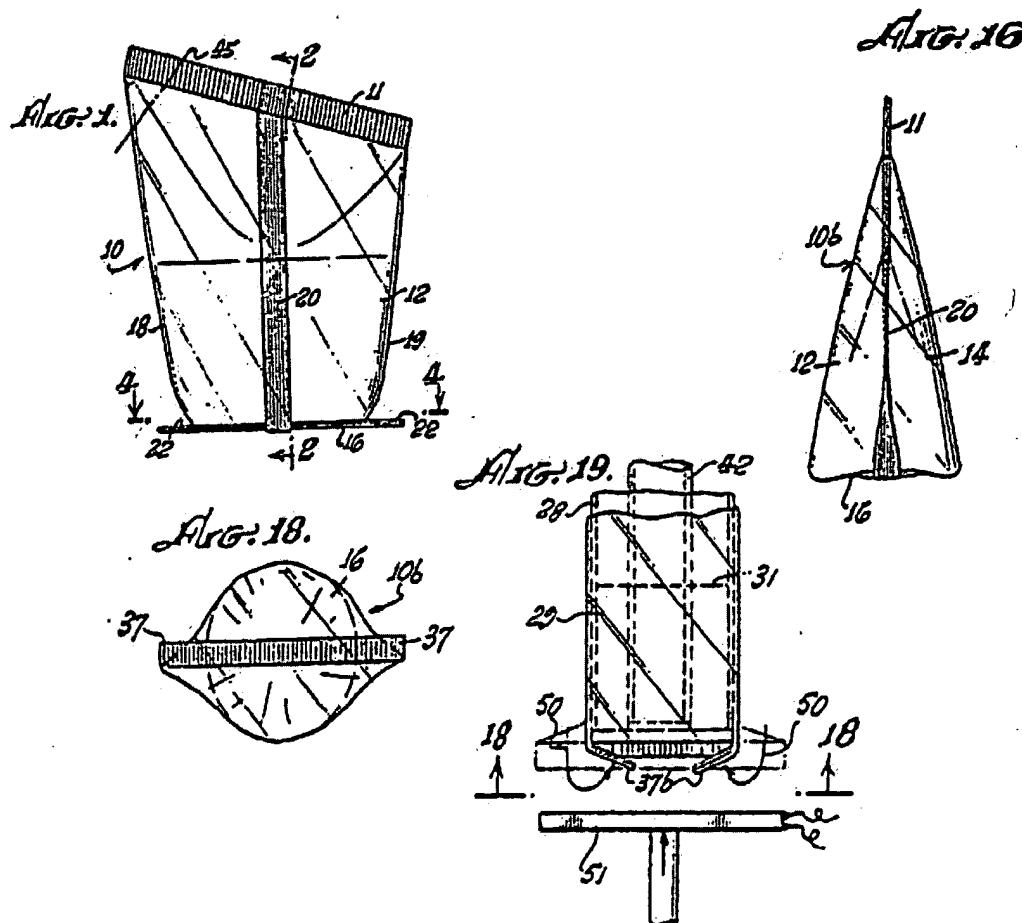
The examiner analogizes what is referred to as web extensions 37 in the Schneider reference (shown immediately below) to the wings 22, 23 (shown above). The examiner further analogizes the location of Schneider's web extensions 37 as being lateral to or on the side of Schneider's web.

Respectfully, Applicant submits that the examiner is in error. As the Figures from Schneider below clearly show, the Schneider method not only does not teach the formation of triangles or wings on the sides of or lateral to the longitudinal seal 20 of the Schneider web, it teaches the formation of these web extensions 37 along and into the center line of the longitudinal seam 20 of Schneider's container. Schneider's extensions 37 are wrapped "underneath" Schneider's formed web/container and bonded to the "bottom" of the container. Clearly, Schneider's extensions 37 are not disposed laterally to or on the sides of Schneider's web/container.

From Schneider's Figures appearing below, and from Schneider's supporting specification describing these components, the process by which Schneider makes the products shown in the below Figures cannot anticipate claims 5-12 or claim 13 of the present application

because Schneider does not form anything resembling triangles or wings on the "sides" of or "lateral" to the longitudinal seal 20 of the Schneider web/package.

To the extent any sort of triangle or wing is formed in the Schneider process at all, that component 37 is formed along the same line as the longitudinal seam 20, see particularly Figs. 16, 18, 19 below. And, those extensions 37 are bent downwardly, not upwardly, and sealed to the "bottom," not the sides of the package. See particularly Fig. 19 below.



The Process by which the Schneider package is formed does not include, disclose or suggest all of the elements of independent Claims 5 and 13 and thus cannot anticipate.

It is fundamental that in order for a Section 102(b) anticipation to exist, the prior art reference must disclose all of the elements of the allegedly anticipated claims. Juicy Whip, Inc. v. Orange Bang, Inc., 63 U.S.P.Q.2d 1251, 292 F.3d 728 (Fed. Cir. 2002); Application of Marshall, 198 U.S.P.Q. 344, 578 F.2d 301 (C.C.P.A. 1978).

The claims in issue in this application are method claims. The standard for finding a Section 102(b) anticipation of a method claim is no less stringent than for an apparatus claim. In the Juicy Whip case for example, the Federal Circuit said:

When the asserted basis of invalidity is [Section 102(b) anticipation], the party with the burden of proof must show that "the subject of the barring activity met each of the limitations of the claim, and thus was an embodiment of the claimed invention." *Scaltech Inc. v. Retec/Tetra, L.L.C.*, 178 F.3d 1378, 1383, 51 USPQ2d 1055, 1058 (Fed.Cir.1999).

"Claim 6 is directed to a "method for inducing sales of a beverage" comprising the step of "positioning a transparent display bowl relative to the dispenser outlet to create the visual impression that said bowl is the reservoir and principal source from which a serving of the beverage is dispensed." '405 patent, col. 12, ll. 53-56. Claim 9 requires that the dispenser be "positioned relative to said outlet to create the visual impression that said container is the reservoir and principal source of said dispensed beverage issuing from said outlet." '405 patent, col. 13, ll. 10- 13. While the record contains testimony from several witnesses which, if believed by the jury, indicates that some of the claim limitations were found in the 1983 and 1988 dispensers, the record is devoid of evidence showing that the above limitations were found in either dispenser.

Similarly, in another method claim case, In Re Marshall, 198 U.S.P.Q. 344, 578 F.2d 301 (C.C.P.A. 1978), the appeals court (C.C.P.A.) stated:

Rejections under 35 U.S.C. s 102 are proper only when the claimed subject matter is identically disclosed or described in the prior art. *In re Arkley*, 455 F.2d 586, 587, 59 CCPA 804, 807, 172 USPQ 524, 526 (1972). In other words, to constitute an **anticipation, all material elements** recited in a claim must be found in one unit of prior art. *Soundscriber Corp. v. United States*, 360 F.2d 954, 960, 175 Ct.Cl. 644, 148 USPQ 298, 301 (1966).

Applying this rule of law to the present case, we must reverse the board's rejection of claims 1-4 under 35 U.S.C. s 102 since the primary reference, the PDR, does not disclose every material element of the claimed subject matter. These **claims** are directed to a weight control **process**. Applicant uses an effective amount of the anesthetic, oxethazaine, to inhibit release of the pancreatic secretory hormones, secretin and pancreozymin, in order to control weight. The PDR, however, teaches using drugs

containing the anesthetic oxethazaine to inhibit release of the acid-stimulating hormone, gastrin, in order to treat esophagitis, gastritis, peptic ulcer and irritable colon syndrome. Nothing in the PDR remotely suggests taking oxethazaine to lose weight

In the present application, independent claims 5 and 13 call for forming and bonding wings on the sides of a pouch lateral to a longitudinal seal or seam. Schneider not only does not teach these method elements, Schneider teaches the opposite, i.e. forming web extensions along and in-line with a longitudinal seal and bonding the extension on the bottom of the package.

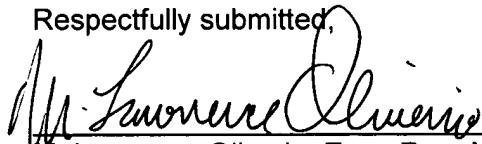
CONCLUSION

For the reasons stated above, it is respectfully requested that the examiner's rejection of claims 5-13 of the present application be reversed and that the present application be allowed for issuance.

REQUEST FOR HEARING

To the extent there is any question that the examiner's rejection should not be reversed, Applicants request a hearing on the present appeal.

Respectfully submitted,



Date:

10/14/2003

M. Lawrence Oliverio, Esq. Reg. No. 30,915
KUDIRKA & JOBSE, LLP
Customer Number 021127
Tel: (617) 367-4600 Fax: (617) 367-4656

IX APPENDIX OF CLAIMS (37 C.F.R. 1.192(c)(9))

The text of the claims involved in the appeal are:

5. A method for manufacturing an inherently stable container made of flexible material, comprising the following steps:

a) folding a continuous film of flexible material of appropriate width, to obtain a pouch having a longitudinal heat-seal and evenly spaced transverse heat-seals, followed by cropping the folded film in a direction transverse to the longitudinal heat seal;

b) heat-sealing in sides of the pouch, at a region of the transverse heat-seals, forming two triangles having wings laterally disposed relative to the longitudinal heat-seal;

c) punch opening said pouch, and optionally filling the pouch with a product; d) folding and bonding the wings laterally relative to the longitudinal heat-seal and, after filling the pouch, simultaneously with the bonding of the wings, heat-sealing an upper open mouth of the pouch.

- 1 6. The method of claim 5, wherein in the first step the film is folded so as to form the pouch, which is closed longitudinally by heat-sealing overlapping flaps of said film, said heat-sealing being preferably located at a center of one of two flat faces of said pouch.
- 4 7. The method of claim 5, wherein a longitudinal dimension of the pouch is determined by way of transverse heat-seals.
- 6 8. The method of claim 6, wherein the heat-sealing of the triangles comprises heat-sealing of two overlapping sheets of flexible material that constitute said pouch so as to form at the base, said two triangles with vertex sedging inside said pouch.
- 9 9. The method of claim 5, further comprising forming ribs during the step for forming the heat-sealed triangles, said ribs being adapted to facilitate, by guided deformation, opening of the pouch at filling.

12 10. The method of claim 9, wherein during filling of the pouch with product a substantially flat
13 base forms, while said wings formed due to the heat-sealed triangles protrude laterally beyond
14 said base.

15 11. The method of claim 10, wherein following said filling step said wings are folded toward
16 the container and are retained thereon.

17 12. The method of claim 5, comprising insertion of the heat-sealed triangles inside the
18 container by way of pushing means which push said triangles from the outside inward.

19 13. A method for manufacturing an inherently stable container made of flexible material,
20 comprising the steps of:

21 a) folding a continuous film of flexible material of appropriate width, to obtain a
22 pouch having a longitudinal heat-seal and evenly spaced transverse heat-seals, followed by
23 cropping the folded film in a direction transverse of the longitudinal heat-seal ;

24 b) heat-sealing two triangles having wings into sides of the pouch lateral to the
25 longitudinal heat-seal, each of the triangles having a base which coincides with one edge of the
26 pouch and a vertex which wedges inwards said pouch lateral to the longitudinal heat-seal punch
27 opening said pouch, and optionally filling the pouch with a product folding and bonding the
28 wings onto the triangles.